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In the Supreme Court of the United States

October Term, 1980

No. _____

CHARLES A. BAGLEY, Petitioner,

versus

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Charles A. Bagley, by his attorney, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered October 27, 1980, which denied Mr. Bagley's petition for rehearing en banc after his conviction had been summarily affirmed without opinion July 8, 1980.

QUESTIONS PRESENTED AND WHY THE WRIT SHOULD BE GRANTED

Did the Court of Appeals for the Ninth Circuit err in holding that "the privilege against self-incrimination

cannot constitute a defense to a section 7203 prosecution when it is asserted to avoid incrimination for a past violation of income tax laws." *United States v. Carlson,* 617 F.2d 518 (CA 9, 1980) at 520.

In summarily affirming the appellant's conviction (apparently on the basis of *Carlson, supra*), the Court of Appeals apparently misconstrued the holding of the United States Supreme Court in the recent case of *Garner v. United States,* 424 U.S. 648 (1976):

> "The fifth amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege, a protection broadened by § 7203's statutory standard of 'willingness'." at p. 662.

The order affirming this Petitioner's conviction consists of the following: "Upon consideration of the appellee's motion to affirm judgment, the judgment of conviction entered by the district court is summarily affirmed."

The appellee's motion contains three contentions, none of which confront the only issue on appeal: If an individual person believes that wages do not constitute gross income requiring the filing of an income tax return, must he nevertheless file a form 1040 on which he asserts his freedom from the obligation to file a form 1040?

Mr. Bagley testified at length at his trial, explaining in detail the basis for his belief that mere recompense for a day's labor — performed without a license of any type — constituted neither gain nor gross income.

At trial the government introduced withholding exemption certificates signed by this appellant which asserted: "I hereby certify under penalties of perjury that

I incurred no liability for federal income tax for (the previous year) and anticipate that I will incur no liability for federal income tax for (the current year)." For the years 1974, 1975, and 1976 — the same years for which the defendant is charged for willful failure to file income tax returns — the defendant had certified under penalties of perjury that he had incurred no liability for federal income tax. It is a violation of 26 U.S.C. § 7205 to file a false or fraudulent withholding exemption certificate, punishable by a term of imprisonment of no more than one year and/or a $500 fine. Had the defendant filed forms 1040 for the years in question on which he asserted his fifth amendment privilege, he would have been prosecuted for willful failure to file because he "failed to provide sufficient information from which to compute a tax liability, which is tantamount to filing no return at all." (*United States v. Porth,* 426 F.2d 519 (CA 10, 1970)). But the government could then introduce the "fifth amendment return" as evidence that the defendant knew he was required to file, contrary to his sworn statement on the withholding exemption certificates (W-4E's).

Turning now to the appellee's motion, it is comprised of three contentions: (1) There is not a shred of evidence supporting defendant's claim of a fifth amendment privilege; (2) the fifth amendment to the Constitution does not excuse a person from filing a tax return; and (3) the privilege against self-incrimination cannot constitute a defense to a section 7203 prosecution when it is asserted to avoid incrimination for past tax violations.

The entirety of the defendant's testimony, consisting of pages 49 through 128 of the transcript, conclusively establishes the fact that a properly filled out form 1040 for the years in question, i.e. on which the defendant listed his wages as gross income, would have incriminated him as to the W-4E's he filed for the same years by virtue of 26 U.S.C. § 7205. "The government con-

cedes that Carlson could have been prosecuted under 26 U.S.C. Section 7205 for filing a false withholding form." (*Carlson*, f.n. 3, p.520). As to the appellee's second contention, we need only look at *Garner* at pp. 658-660 to refute it:

> "Garner relies next on *Mackey v. United States*, 401 U.S. 667 (1971), the relevance of which can only be understood in light of *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968). In the latter cases the Court considered whether the fifth amendment was a defense in prosecutions for failure to file the returns required of gamblers in connection with the federal occupational and excise taxes on gambling. The Court found that any disclosures made in connection with the payment of those taxes tended to incriminate because of the pervasive criminal regulation of gambling activities . . . Since submitting a claim of privilege in lieu of the returns would also incriminate, the Court held that 'the privilege could be exercised by simply failing to file'."

The decisions in *Marchetti* and *Grosso* were followed by *Haynes v. United States*, 390 U.S. 85 (1968) and *Leary v. United States*, 395 U.S. 6 (1969). In *Haynes*, the Court considered the question, "If, as petitioner urges, his conviction under 26 U.S.C. Section 5851 is essentially indistinguishable from a conviction premised directly upon a failure to register under 26 U.S.C. Section 5841, and if a prosecution under Section 5841 would have punished petitioner for his failure to incriminate himself, it would follow that a proper claim of privilege should have provided a full defense to this prosecution." The Court in *Haynes* held that petitioner's conviction offended the fifth amendment and reversed it. In *Leary*, the Court held

that 26 U.S.C. Sections 4741, 4742 and 4743 compelled Leary to incriminate himself in order to comply with 26 U.S.C. Section 4744(a)(2) and, accordingly, reversed his conviction thereunder, basing the reversal on the following principle of law:

> "The aspect of the self-incrimination privilege which was involved in *Marchetti*, and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." 395 U.S. 28.

The third contention contained in appellee's motion is vitiated by the fact that each of the cited cases herein deals precisely with avoiding incrimination for past tax violations.

Considering the gravity of the question presented and the recent vintage and obvious relevance of the United States Supreme Court decisions cited herein, Petitioner respectfully requests that this Court grant certiorari to correct what Petitioner submits is a serious error in restricting the scope of the fifth amendment's protection, an error which could affect many thousands of citizen-taxpayers.

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OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, a copy of which is attached hereto as Appendix A, was filed on July 8, 1980, and that Court's order denying the Petition for Rehearing en banc, a copy of which is attached hereto as Appendix B, was entered October 27, 1980.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The fifth amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself."

II. Title 26 U.S.C. Section 7203 provides "that any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution".

III. Title 26 U.S.C. Section 7205 provides that "any individual required to supply information to his employer under section 3402(f) who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any penalty otherwise provided, upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both".

STATEMENT OF THE CASE

Charles A. Bagley was born in Americus, Georgia, in 1922. He served in the U.S. Marine Corps from 1940-46 and was wounded in Iwo Jima, for which he was awarded a Purple Heart. In 1946, he was honorably discharged from the Marine Corps. Shortly thereafter he married his current wife of 34 years and he worked at various jobs until employment as an upholsterer with the Los Angeles Department of Labor and Power, where he has been continuously employed since 1959.

By an Indictment filed December 18, 1979, Charles A. Bagley was charged with three counts of willful failure to file income tax returns for 1974, 1975, and 1976, in violation of 26 U.S.C. Section 7203. After pleading not guilty at his arraignment, the appellant, Charles A. Bagley, was released on a personal recognizance bond.

Bagley had timely filed a pre-trial motion to dismiss based on the fifth amendment privilege against self-incrimination and the Privacy Act of 1974. It is undisputed that the filing of the returns in question would have incriminated Bagley and the government concedes that he could have been prosecuted under 26 U.S.C. Section 7205 for filing false withholding forms. The trial court heard oral argument on the motion on February 11, 1980, and denied the motion immediately prior to trial

(RT pp. 4-10, 32-34) the next morning. On February 13, 1980, the jury returned a verdict of guilty on all three counts. Judgment of guilty was entered on all counts and sentence pronounced March 4, 1980: three years of probation and a fine of $3,000 imposed in addition to the usual conditions of probation. An appeal was taken to the Court of Appeals for the Ninth Circuit. Bagley's conviction was affirmed on motion of the government by a decision filed July 8, 1980; that Court's order denying Bagley's petition for rehearing en banc was entered October 27, 1980.

Appellant's bond has been continued in the same form as during the pendency of trial proceedings.

PORTIONS OF THE TRIAL

Until his indictment for willful failure to file income tax returns for the years 1974, 1975, and 1976, this 57-year old man had never been accused of a crime. During 1973 he began attending "patriotic meetings where people came to learn about the Constitution". (RT p. 61) At these meetings certain sections of the Constitution were read and discussed as were court cases construing these sections. Particularly relevant to this case were discussions of the *Brushaber* case (*Brushaber v. Union Pacific R.R.*, 240 U.S. 1 (1915) construing the sixteenth amendment to the United States Constitution, (RT 66-69) and other cases dealing with the taxability of wages as income (RT p. 72-76). Bagley's testimony evidences a belief that his wages were not taxable income, hence he was: (1) not a person required to file an income tax return (26 U.S.C. § 6015); and (2) entitled to file a withholding exemption certificate with his employer so that no federal income tax would be withheld from his wages (RT p. 76-96). Contrary to the dictum contained in *United States v. Neff*, 615 F.2d 1235 (CA 9, 1980), that ". . . the *Sullivan* precedent . . . states that the fifth amendment shall

never justify a complete failure to file a return", the *Sullivan* case (*United States v. Sullivan*, 274 U.S. 259, 47 S. Ct. 607, 71 L. Ed. 1037(1927)) merely held that a person who is required to file — as Manley Sullivan conceded he was — could not avoid the filing requirement on the ground that the answers to certain questions on the 1040 form would incriminate him; Sullivan had to claim the fifth amendment in response to specific questions which could incriminate. Nothing in *Sullivan, supra,* or *Garner v. United States,* 424 U.S. 648, 96 S. Ct. 1178, 47 L. Ed.2d 370 (1976) can be read to imply that a person not required to file an income tax return because of insufficient income is required to file in order to invoke his fifth amendment rights regarding a W-4E previously filed based on insufficient income. To require the filing of a 1040 is an admission by the taxpayer that he is a person required to do so by reason of his gross income — impeaching Bagley's sworn statement on his W-4E's since for 1974, 1975, and 1976 Bagley received only wages as income, and (2) as to the 1040 itself which would be deemed not filed anyway because of the fifth amendment claims instead of sufficient information to compute a tax liability.

ARGUMENT FOR GRANTING THE WRIT AND QUESTIONS ON REVIEW

CAN THE PRIVILEGE AGAINST SELF-INCRIMINATION CONSTITUTE A DEFENSE TO A SECTION 7203 (26 U.S.C. § 7203) PROSECUTION WHEN IT IS PRESENTED TO AVOID INCRIMINATION FOR A PAST VIOLATION OF INCOME TAX LAWS?

As set forth above, the United States Court of Appeals for the Ninth Circuit phrased the issue in *United States v. Carlson,* 617 F.2d 518 (CA 9, 1980). The only

significant factual difference between the defendant in that case and Mr. Bagley in this one is that Carlson claimed 99 withholding exemptions on his W-4, whereas Bagley certified under penalties of perjury that he incurred no liability for federal income tax by filing a W-4E. The issue in this case is identical to that just decided by the Court of Appeals in *Carlson*. That decision requires reversal, resting as it does on assertions of fact and law which are erroneous.

Section II of the Ninth Circuit's opinion in *Carlson* begins by prefacing "the issue" in that case, as shown by the capitalized language at the top of the preceding page, with the assertion that: "This case presents a question of first impression . . .". The opinion continues:

> "The United States Supreme Court has stated that '[a] Section 7203 conviction cannot be based on a valid exercise of the privilege', *Garner v. U.S.*, 424 U.S. 648, 662 (1976), but the Court expressly limited the reach of its decision in *Garner* 'to only those [claims of privilege] justified by a fear of self-incrimination *other that under the tax laws.*'"
>
> Id. at 650 n. 3 *Garner* thus left open the extent to which the fifth amendment prevents compelled self-incrimination in tax returns for past tax law crimes."

Petitioner submits that nothing addressed or decided by this Court in *Garner* justifies the conclusion that the fifth amendment does not prevent compelled self-incrimination "in tax returns for past tax law crimes". This is so because Mr. Garner disclosed that his occupation was gambling on his tax return and that tax return was introduced at his trial for illegal gambling activities over Garner's objection that he had been com-

pelled to provide the information or face prosecution for willful failure to file an income tax return; hence, his fifth amendment right had been violated by use of the compelled disclosure at his gambling trial. This Court held that one who wishes to invoke his fifth amendment right to be free from compelled self-incrimination must withhold disclosure or waive the right. No limitation on the protection offered by the fifth amendment on tax returns for past tax law crimes was necessitated by the *Garner* opinion.

The Court of Appeals' opinion in *Carlson* concedes ". . . it appears that *Carlson* satisfies those indicia of validity previously considered by us in cases where the privilege has been asserted to avoid self-incrimination other than under the tax laws". In a footnote, the Ninth Circuit allows: "The government concedes that Carlson could have been prosecuted under 26 U.S.C. § 7205 for filing a false withholding form". This footnote is critical because it contradicts the appellate court's ultimate justification for its decision (found in the very next paragraph):

> "When the privilege is asserted for past tax crimes, however, additional complications arise. If Carlson's assertion of the privilege were valid, it would license a form of conduct that would undermine the entire system of personal income tax collection."

There is no evidence to support the contention that the system would be undermined by honoring Carlson's claim of privilege and the Court recognizes that Carlson

could have been prosecuted for filing a false withholding exemption certificate under 26 U.S.C. § 7205.

Nevertheless, the opinion continues:

> "The essence of Carlson's plan was to claim 99 withholding exemptions so that no federal income tax could be withheld by his employer and then to assert the fifth amendment privilege in lieu of a properly completed tax return, thus attempting to avoid both prosecution for the false withholding claim and payment of required income taxes. The widespread use of such a scheme would emasculate the present system of revenue collection which, by virtue of its scope alone, necessarily depends upon personal reporting by wage earners."

Though the quoted language yields the inference that Carlson had nearly succeeded in engineering "the perfect crime", this appears incorrect, since, as conceded by the Court earlier, "Carlson could have been prosecuted under 26 U.S.C. § 7205 for filing a false withholding form". Furthermore, so could anyone else who chose to pursue a scheme similar to Carlson's; the maximum penalties for violating § 7203 and § 7205 are one year imprisonment and $10,000, and one year imprisonment and $500, respectively. A 1040 form with no information is hardly an insuperable barrier for a § 7205 conviction: The IRS merely compels the employer who received the allegedly false withholding certificate to produce the payroll records which would indicate whether the employee is a person required to file an income tax return. If no return has been filed, or the return does not affirmatively demonstrate entitlement to reduced withholding, the IRS can and — in many cases — does instruct the employer to disregard the withholding exemption claimed and the recalcitrant taxpayer must sue in the

Tax Court or District Court if he wishes to challenge the IRS disallowance.

Should the IRS and/or Department of Justice feel that criminal prosecution is appropriate, a 1040 form is not necessary to the proof of a violation of § 7205. The receipt of wages evidenced by the employer's payroll records and the claim of exemption from withholding are sufficient to sustain a conviction under § 7205 unless the taxpayer shows itemized deductions or other justification for filing withholding certificates that eliminate income tax payments being deducted by his employer and paid to the Internal Revenue Service. Without even considering these facts, the *Carlson* opinion erects a dilemma the non-existence of which was conceded by the Court in its previously quoted footnote that the government can prosecute offenders employing a "Carlson-type" scheme under 26 U.S.C. § 7205 and the fifth amendment could be spared the deleterious effects of the logical predicate to the Court's *ratio decidendi* in *Carlson*.

But the *Carlson* opinion continues:

> "We are thus confronted with the collision of two critical interests: the privilege against self-incrimination and the need for public revenue collection by a process necessarily reliant on self-reporting.
>
> "To decide which of these two interests prevails, we follow Supreme Court guidance . . ."

The *Carlson* opinion then quotes from a plurality opinion in *California v. Byers*, 402 U.S. 424 (1971), which is then relegated to a discussion in a footnote (f.n.5) where it is admitted that the "balancing approach" for which *Byers* was follow[ed] [for] Supreme Court guidance" was

actually rejected by the majority of the *Byers* Court. This footnote continues:

> ". . . were we to adhere to an absolute protection against incrimination, we would be forced either to abandon a highly important information gathering device or to engage in the fiction that it does not incriminate."

After noting that the assertion that "we would have to abandon a highly important information gathering device" is an unsupported contention, we must scrutinize the conclusion of this footnote:

> "Whether the government may punish a person who asserts the privilege in lieu of providing tax information 'cannot be answered on the ground that compelling him to come forward is not incriminating, for it surely is. It can only be answered by determining whether the government's interest in raising revenue is sufficiently important to justify some reduction in the protection of the privilege'." [citation omitted]

At the moment the *Carlson* court concedes the undeniable fact of compelled self-incrimination. It equates the limited right to invoke the fifth amendment on a tax return with a serious threat to the government's ability to raise revenue; this equation is totally lacking in factual support. To the contrary, citizens who invoke the fifth amendment on their tax returns have guaranteed that their financial affairs will be scrutinized by the IRS, unlike those who merely falsify their returns and thereby escape detection. The opinion cites *Schmerber v. California*, 384 U.S. 757, 762 (1966), a case dealing with compulsory production of non-

testimonial evidence, for the proposition that "the privilege has never been given the full scope which the values it helps to protect suggest". The Court of Appeals' reasoning can only be sustained by ignoring the unequivocal line of Supreme Court decisions which define the scope of the privilege:

> "The fifth amendment declares in part that 'No person . . . shall be compelled in any criminal case to be a witness against himself.' This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should be sacrificed.' *Feldman v. United States,* 322 U.S. 487, 489, 88 L. Ed. 1408, 1412, 64 S. Ct. 1082, 152 A.L.R. 982 (1944). This provision of the amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman v. Hitchcock,* 142 U.S. 547, 562, 35 L. Ed. 1110, 1113, 12 S. Ct. 195 (1892); *Arndstein v. McCarthy,* 254 U.S. 71, 72, 73, 64 L. Ed. 138, 141, 142, 41 S. Ct. 26 (1920)." *Hoffman v. United States,* 341 U.S. 479, 486, 95 L. Ed. 118, 124, 71 S. Ct. 814 (1951).

Thus did this Court provide us with a concise exegesis of the context in which the instant case must be analyzed.

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute

> the claimant for a federal crime. *Blau v. United States,* 340 U.S. 159, 170, 71 S. Ct. 223 (1950). But this prosecution must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason v. United States,* 244 U.S. 362, 365, 61 L. Ed. 1198, 1199, 37 S. Ct. 621 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination . . . However, if the witness, upon interposing his claim of privilege were required to prove the hazard in a sense in which a claim is required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result." *Hoffman, supra,* at 486, 487.

During 1975, 1976, and 1977, Petitioner Charles A. Bagley submitted withholding exemption certificates (W-4E's) to his employer on which he inscribed his signature below the following statement:

> "Under penalties of perjury I certify that I incurred no liability for federal income tax for (the previous year) and that I anticipate that I will incur no liability for federal income tax for (the current year.)"

The assertion that this Petitioner would have incriminated himself had he "provided sufficient

information from which to compute a tax liability" on his income tax returns is conceded by the *Carlson* court; had the Petitioner "provided sufficient information from which to compute a tax liability" he would have directly impeached his assertion that he incurred no tax liability.

As this Court held in *Lefkowitz v. Turley,* 414 U.S. 70, 38 L. Ed. 2d 274, 94 S. Ct. 316, at 77 (1973):

> "The [fifth] amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *McCarthy v. Arndstein,* 266 U.S. 34, 40, 69 L. Ed. 158, 45 S. Ct. 16 (1924), squarely held that '[T]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.'
>
> "In this respect, *McCarthy v. Arndstein* reflected the settled view in this Court. The object of the amendment 'was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.' *Counselman v. Hitchcock,* 142 U.S 547, 562, 36 L. Ed. 1110, 12 S. Ct. 195 (1892); *Brown v. United States,* 168 U.S. 543, 542-543, 42 L. Ed. 568, 18 S. Ct. 183 (1897); *Brown v. Walker,* 161 U.S. 591, 50 L. Ed. 819, 16

S. Ct. 644 (1896); *Boyd v. United States,* 116 U.S. 634, 637-638, 29 L.Ed. 746, 6 S. Ct. 538 (1886); *United States v. Saline Bank,* 1 Pet. 100, 7 L. Ed. 69 (1828)."

The fifth amendment problems created by §§ 7203 and 7205 are analogous to the situations which the Supreme Court confronted in *Haynes v. United States,* 390 U.S. 85, 19 L. Ed. 2d 923, 88 S. Ct. 722 (1968), and *Leary v. United States,* 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969). *Haynes* concerned "whether enforcement of § 5851 (of Title 26, U.S.C.) against petitioner, despite his assertion of the privilege against self-incrimination, is constitutionally permissible . . . and if a prosectuion under § 5841 would have punished petitioner for his failure to incriminate himself, it would follow that a proper claim of privilege should have provided a full defense to this prosecution". *Haynes, supra,* at 90. The difference between *Haynes* and the case at bar inheres in the facial invalidity of the two statutes in *Haynes,* in that possession of certain firearms was prohibited by § 5851 and failure to report that crime was a criminal offense under § 5841, whereas in the instant case the statutes are not facially invalid, but, nevertheless, infringe on this Petitioner's fifth amendment privilege because § 7205 prohibits certain conduct and failure to provide information which would incriminate this Petitioner under § 7205 comprises the offenses charged under § 7203. In both *Haynes, supra,* and this case, the synergistic effect of two statutes infringes upon Petitioner's fifth amendment rights.

Leary involved the identical issues, i.e. a conviction for failure to fill out a tax form which would have incri-

minated, phrased thusly by the U.S. Supreme Court at 23 L. Ed. 2d p. 73-74:

> "The aspect of the self-incrimination privilege which was involved in *Marchetti* (*Marchetti v. United States*, 390 U.S. 39, 19 L. Ed. 2d 889, 88 S. Ct. 697 (1968)), and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act . . .
>
> ". . . Accordingly, we reverse petitioner's conviction . . .".

As the Supreme Court has frequently and consistently recognized:

> "'The constitutional privilege against self-incrimination has two primary inter-related facets: The government may not use compulsion to elicit self-incriminating statements, see, e.g., *Counselman v. Hitchcock*, 142 U.S. 547 [35 L.Ed. 1110, 12 S. Ct. 195]; and the government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. See, e.g. *Haynes v. Washington*, 373 U.S. 503 [10 L. Ed. 2d 513, 83 S. Ct. 1336].' *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57 n. 6, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964) . . .
>
> ". . .'The privilege protects against the use of compelled statements *as well as* guarantees the right to remain silent absent immunity.' *Garner v. United States*, 424 U.S. 648, 653, 47 L. Ed. 2d 370, 96 S. Ct. 1178 (1976) (emphasis supplied). *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653, 84

S. Ct. 1489 (1964), held that the fifth amendment — the 'essential mainstay' of our 'American system of criminal prosecution', id., at 12 L. Ed. 2d 653, 84 S.Ct. 1489 — protects 'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' Id., at 12 L. Ed. 2d 653, 84 S. Ct. 1489. See *Spevack v. Klein*, 385 U.S. 511, 514, 17 L. Ed. 2d 574, 87 S. Ct. 625 (1967). As the Chief Justice recently noted: 'This Court has always broadly construed [the fifth amendment] protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.' *Maness v. Meyers*, 419 U.S. 449, 461, 42 L. Ed. 2d 574, 95 S. Ct. 584 [425 U.S. 327] (1975). Further, 'a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar v. United States*, 406 U.S. 441, [32 L. Ed. 2d 212, 92 S. Ct. 1653] (1972).' *Lefkowitz v. Turley*, 414 U.S. 70, 78, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973). See *Maness v. Meyers, supra*, at 473, 42 L. Ed. 2d 574, 95 S. Ct. 584 (White, J., concurring in result).

"Thus, the fifth amendment not only excludes from use in criminal proceedings any evidence obtained from the defendant in violation of the privilege, but also is operative before criminal proceedings are instituted: it bars the government from using compulsion to obtain incriminating information from any person. Moreover, the protected information 'does not merely encompass evidence which may lead to

> criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution . . . *Hoffman v. United States*, 341 U. S. 479, 486 [95 L. Ed. 1118, 71 S. Ct. 814] (1951).' *Maness v. Meyers, supra*, at 461, 42 L. Ed. 2d 574, 95 S. Ct. 584. And it is not necessary that a person be guilty of criminal misconduct to invoke the privilege; an innocent person, perhaps fearing that revelation of information would tend to connect him with a crime he did not commit, also has its protection. " 'The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.' " *Grunewald v. United States*, 353 U.S. 391, 421, 1 L. Ed. 2d 931, 77 S. Ct. 963, 62 A.L.R. 2d 1344 (1957), quoting *Slochower v. Board of Education*, 350 U.S. 551, 557-558, 100 L. Ed. 692, 76 S. Ct. 637 (1956). See E. Griswold, The Fifth Amendment Today, 10-22 (1955); Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. Chi. L. Rev. 472 (1957).

Having provided an analysis of the scope of the privilege as enunciated in a long line of Supreme Court decisions — an analysis omitted from the Carlson opinion — let us turn to the remainder of that opinion.

> "In the case before us, Carlson has attempted to take advantage of the privilege's protective capacity to further a calculated effort to avoid the payment of taxes. Although it is true that Carlson actually seeks protection against self-incrimination for his prior tax crime, he does so only as part of an overall plan to evade taxes. The first step of that plan — submitting a false withholding form to his employer — was concealed from the Service by assertion of the

> fifth amendment on Carlson's year-end returns; and the very act of asserting the fifth amendment also effectuated the second step of the plan — failing to file meaningful returns that would divulge both his prior misstatements and his overall year-end tax liabilities. In other words, the fifth amendment was the linchpin of Carlson's plan to evade the payment of taxes. He used the privilege more as a sword than a shield."

The quoted metaphor reveals an obsession with "abuse" of the privilege, but it is founded on a falsehood: Assertion of the fifth amendment on a tax return does not conceal the false withholding certificate from the Service — it guarantees the discovery by the Service because any such claim triggers an investigation of the fifth amendment filer. (See Internal Revenue Agents' Manual Supplement of January 10, 1979, Examination and Investigation of Illegal Tax Protest-type Activities (9G-93)).

The *Carlson* Court is apparently laboring under the misapprehension that the *Carlson* "sword" constitutes a danger to the fisc. But the rule laid down in *Carlson* merely eliminates the requirement that the government choose the proper statute if it elects a criminal prosecution — 26 U.S.C. § 7205 instead of 26 U.S.C. § 7203 — not a very great burden before this decision.

> "Were taxpayers permitted to employ Carlson's scheme they could avoid filing completed tax returns and thereby severely impair the government's ability to determine tax liability. Such frustration of the self-reporting system would force the Internal Revenue Service either to investigate each citizen's claimed and permissible withholding exemptions in an effort to

> prosecute for each separate filing of a false withholding claim or to bear the burden of investigating and calculating from scratch each citizen's tax liability in order to assess the appropriate amount of income tax. Needless to say, either alternative would be inordinately burdensome if not impossible.

This contention ignores the fact conceded earlier in the opinion: One could only invoke the fifth amendment by filing the false withholding certificate as to which the tax return would incriminate, hence one must expose himself to criminal liability under 26 U.S.C. § 7205 in order to be free from compelled self-incrimination under 26 U.S.C. § 7203. The assertion that a significant number of taxpayers would file "fifth amendment" tax returns since they could only be prosecuted under 7205 — instead of both 7205 and 7203 as the Carlson opinion mandates — is without factual or logical support.

CONCLUSION

Petitioner respectfully submits that as long as we are governed by the Constitution in its present form, citizens cannot properly be convicted of any crime reducible to a failure to incriminate themselves. The Justice Department can prosecute citizens who violate 26 U.S.C. § 7205 without the additional option of 26 U.S.C. § 7203. There is no reason to believe that the system of voluntary self-assessment is imperiled by vindicating the fifth amendment as to 1040 forms and prosecuting citizens who file false or fraudulent withholding forms pursuant to 26 U.S.C. § 7205. For these and all the foregoing reasons, this Court should reverse the conviction of Charles A. Bagley. If the Department of Justice wishes to prosecute him under 26 U.S.C. § 7205, the reversal of this conviction would not preclude it.

Respectfully submitted,

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Attorney for
Defendant-Petitioner

AFFIDAVIT OF SERVICE

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the U. S. mail, at Denver, Colorado, with sufficient postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

this 25th day of November, 1980.

William A. Cohan

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CHARLES A. BAGLEY, Defendant-Appellant.	No. 80-1184 DC# CR 79-1010-RMT Central California ORDER

Before: GOODWIN and FERGUSON, Circuit Judges

Upon consideration of appellee's motion to affirm judgment, the judgment of conviction entered by the district court is summarily affirmed. Appellee's motion for an extension of time within which to file its brief is denied as moot.

CR CAL 6/30/80

FILED
July 8, 1980
RICHARD H. DEANE
Clerk, US Court of Appeals

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APPENDIX B

FILED
Oct 27 1980
Richard H. Deane
Clerk, US Court of
Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES A. BAGLEY, Defendant-Appellant.	No. 80-1184 DC# CR 79-1010-RMT ORDER

Before: GOODWIN and FERGUSON, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES CODE, Title 26, § 7205

7205. Fraudulent Withholding Exemption Certificate or Failure to Supply Information

Any individual required to supply information to his employer under section 3402(f) who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any penalty otherwise provided, upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both. (Aug. 16, 1954, c. 736, 68A Stat. 852.)

APPENDIX D

UNITED STATES CODE, Title 26, § 7203

7203. Willful Failure to File Return, Supply Information, or Pay Tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851.)